applies to transfers *inter vivos* for the reason that the land which is the subject of the temporary occupation licence can never form part of the assets of the deceased; and neither can anything attached to the land which goes with the land form part of the assets of the deceased. It is not part of the estate at all; and it cannot pass on intestacy and it cannot be transmitted by the will of a testator. The licence is personal to the holder; it dies with the holder. If the collector of land revenue in exercise of the powers delegated to him by the Ruler-in-Council chooses to issue a fresh licence to a legatee or a next-of-kin that is a matter entirely in his discretion. Here, letters of administration with the will annexed were granted originally to one Thayanayagi, daughter of Singaravelu. That was in 1940. Subsequently in February, 1957, that grant was revoked and letters of administration with the will annexed were issued to the present applicant. In the meantime the original administratrix had purported to sell the house in question to the respondent for valuable consideration. That she had no power to do so is of course beside the point. The fact is that the temporary occupation licence which had been re-issued in her name after the death of the deceased, Vengadasalam Pillay, was then called in or surrendered and re-issued in the name of the purchaser, namely, the respondent in these proceedings. It is by virtue of the temporary occupation licence issued in his name that he is entitled to occupy the land and the house that stands upon the land. In my view there is no power in this court to alter that position nor do I think that the legal remedy which the applicant seeks is available to her at all. She may have some remedy in damages against Thayanayagi. It is not for me to express any opinion on that in these proceedings, but this court has no jurisdiction to transfer to her or to give her leave to transfer to herself a house which goes with land that is the property of the State. Her remedy is to go before the collector of land revenue with all the facts. If he chooses to hold some sort of enquiry into the facts, he is entitled to do so; and if he decides to hold an enquiry he will doubtless hear the representations which are put forward by or on behalf of both parties to these proceedings. If he then chooses to exercise his discretion in the matter of temporary occupation licence he is in a position to rectify the present position, if it needs rectification. But the whole matter is entirely one for his discretion. If he were to decide — or because he is only acting under delegated authority, — if the Ruler-in-Council were to decide and were to instruct the collector accordingly — that the temporary occupation licence was not to be renewed at the end of the current year, what then? Nobody has any claim in law to the issue of a temporary occupation licence. The land which is the property of the State would cease to be in the occupation of any private individual, and the house would be the property of the State. And in the absence of any contract by the State it would again be entirely a matter of discretion whether the State either allowed any compensation to any person for the house or permitted any person to demolish and remove the materials of the house. For these reasons the application must fail and I accordingly dismiss it with costs.

Application dismissed.

Solicitors: *S. A. Lingam*; *Braddell & Ramani.*

BAJU RIA v. LIAU KIM LIAN

[C.A. (Thomson C.J., Barakbah and Azmi JJ.) October 21, 1961]

[Kuala Trengganu — F.M. Civil Appeal No. 4 of 1961]

Moneylending — Definition of "moneylender" — Carrying on business of moneylending — Presumption — Rebuttal —Moneylenders Ordinance, 1951, ss. 2, 3 & 15.

The plaintiff brought an action against the defendant for the sum of $8,000 for money lent. The substantial defence was that the plaintiff was an unlicensed moneylender and that therefore by reason of section 15 of the Moneylenders Ordinance, 1951, no contract for the repayment of money lent by her was enforeable. The plaintiff had been carrying on the business of a rubber and rice dealer for a number of years but she admitted that she had lent money on three specific occasions otherwise than in the course of her business as a rubber and rice dealer. The trial judge gave judgment for the plaintiff and the defendant appealed.

Held: although under section 3 of the Moneylenders Ordinance, 1951, a presumption arose that the plaintiff was a moneylender she had satisfied the court that she was in fact carrying on a genuine business as a rubber dealer and a rice dealer. It was in the course of and for the purpose of that business that she advanced money against future deliveries of rubber and rice and although occasionally she obliged friends and neighbours with loans she was not a moneylender within the meaning of the definition of "moneylender" in the Ordinance and she had accordingly rebutted the presumption that arose under section 3.

Cases referred to:—

(1) *Esmail Sahib* v. *Noordin* [1956] M.L.J. 98.

(2) *Litchfield* v. *Dreyfus* [1906] 1 K.B. 584, 589

(3) *Edgelow* v. *MacElwee* [1918] 1 K.B. 205, 207.

(4) *Tong Peng Hong* v. *Public Prosecutor* [1955] M.L.J. 232, 233.

COURT OF APPEAL.

N. Sharma for the appellant (defendant).

H. L. Wrigglesworth for the respondent (plaintiff).

Cur. Adv. Vult.

Thomson C.J.: The facts of this case are sufficiently set out in the long and careful judgment of Hepworth J. and I do not think it is necessary to repeat them in any great detail here.

The plaintiff and the defendant both reside in the small town of Jerteh where the plaintiff carries on business as a licensed dealer in rubber and rice and the defendant carries on a cinema.

Some time prior to October, 1957, there were certain dealings between the parties. It is, I think, common ground that as a result of these the defendant became in some way indebted to the plaintiff in a sum of $8,000. The plaintiff's version of these dealings was that she was anxious to buy a house belonging to the estate of the defendant's late father and that she lent him $8,000 without interest on the understanding that this would be applied in due course towards the purchase price of the house. The gist of the defendant's version was that some time previously he had borrowed $3,800 from the plaintiff at interest, that no interest had been paid and that the sum of $8,000 was made up of this sum of $3,800 together with accrued interest.

In the event the plaintiff issued a writ for for $8,000 for money lent and she issued it against the defendant personally and also against him as administrator of the estate of his deceased father. For the moment I propose to disregard this attempt to bring in a claim against the estate of the deceased father but I shall return to it later.

The defendant's only defence of substance was that the plaintiff was an unlicensed moneylender and that therefore by reason of section 15 of the Moneylenders Ordinance, 1951, no contract for the repayment of money lent by her was enforceable. It is true that he set up a number of other rather confused defences. One of these was that in the course of their dealings, as he described them, he had pledged a large quantity of jewellery with the plaintiff as security for his loan from which she had agreed to return in consideration of his admitting liability for the sum of $8,000 and which she had failed to return. Another was that she was suing on a piece of paper signed by both parties which was described as a bill of sale but which was clearly invalid as such because the subject matter of the schedule was not a chattel but a piece of land and this in any event was part of the estate of his deceased father and so incapable of being dealt with without leave of the court.

In the event Hepworth J. put the so-called bill of sale where it properly belonged, that is to say in the forensic waste paper basket. He accepted the plaintiff's version of the transaction between the parties and he rejected the defendant's version mainly, but not solely, because his evidence in court differed on a large number of material details from what he had had said in an affidavit filed in the course of the interlocutory proceedings. He then proceeded to consider the defence under the Moneylenders Ordinance and for reasons to which I shall return rejected it. He accordingly gave judgment for the plaintiff for the sum of $8,000 as prayed.

Against that judgment the defendant has now appealed, and I do not think I am doing any injustice to him to say that his only grounds of appeal of any substance are connected with the rejection of his defence under the Moneylenders Ordinance, which, indeed, was his only defence which had any substance at all.

By section 15 of the Ordinance no contract for the repayment of money lent by an unlicensed moneylender is enforceable and here if the plaintiff is a moneylender she is admittedly unlicensed as such. By section 2 the expression "moneylender" for the purposes of the Ordinance includes "every person whose business is that of moneylending or who carries on....that business" but that definition is subject to a number of exceptions one of which is "any person.... *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money". Section 3 provides that subject to the exceptions mentioned in the definition of "moneylender", that material one of which has been stated, any person who lends a sum of money in consideration of a larger sum being repaid is to be deemed to be a moneylender for the purposes of the Ordinance until the contrary be proved.

In the present case the plaintiff admitted that on three specific occasions she had lent money at interest otherwise than in the course of her business as a rubber dealer. The defence also alleged three other such occasions, which, however, she did not admit and the evidence of which the trial judge did not accept. On her own admissions the presumption under section 3 arose against her and she was to be deemed to be a moneylender until she proved the contrary. It became necessary, in effect, for her to prove by the ordinary standards applicable to civil litigation that she was not a moneylender if she was to escape the consequences of the Ordinance and be prevented from recovering her money.

The trial judge has referred to a *dictum* by Spenser-Wilkinson J. (as he then was) that it is difficult to see what a plaintiff can do to prove that he is not a moneylender (see *Esmail Sahib* v. *Noordin* [1]). Perhaps, however, it is not

necessarily very difficult when it is borne in mind just what has to be proved. A moneylender is not a person who lends money, he is a person who carries on the business of moneylending and "carrying on" involves some sort of course of continuing conduct. For example, I myself have been to the races at least three times in the last five years and on each occasion have placed small bets. On that it is hardly necessary to observe that it would be a misuse of the English language to say that I was carrying on the business of betting. As was said by Farwell J. in the case of *Litchfield* v. *Dreyfus* [2]:—

"Speaking generally, a man who carries on a moneylending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as 'friends' or otherwise. It is a question of fact in each case."

In the case of *Edglow* v. *MacElwee* [3] McCardie J. said that that *dictum* might require future consideration but so far as I am aware it has not yet received it.

If, as is the case with the English Act, there was not section 3 it would lie on the defendant who sought the protection of the Ordinance to show not merely that the plaintiff had lent money at interest on several isolated occasions but that such instances as were proved made out a course of business. The effect of section 3 is that when isolated instances are proved it is for the plaintiff to prove that they do not make out a course of business. I discussed the effect of such provision in relation to the criminal law in the case of *Tong Peng Hong* v. *Public Prosecutor* [4] where I said:

"The object of such provisions is not to create new offences. Nor is it to lead to the conviction of innocent persons. It is to ensure that the courts should draw from certain facts, once they are proved, the inferences that experience has shown a reasonable man would normally draw from such facts."

Adapting these observations to the Moneylenders Ordinance I would say that the object of section 3 is not to create a class of what one might call constructive moneylenders by operation of law but to ensure that the courts apply such consideration of probability and common sense as in the opinion of the legislature experience and prudence shew to be desirable if justice is to be done.

In the present case the plaintiff has been carrying on a genuine business as a rubber dealer and as a rice dealer for a number of years. She had been licensed as a rubber dealer for about twenty years and as a rice dealer for ten years. She said that in the course of and for the purposes of her business it was her practice to advance money against future deliveries of rubber and rice. Apart from this she said she was occasionally approached by neighbours for loans of money not connected with future deliveries of produce and that in a small community like Jerteh, where she was known as a comparatively wealthy woman, she found it extremely embarrassing to refuse such requests. In fact on her own account of her business she was, *mutatis mutandis*, very much in the same position as the plaintiff in *Litchfield* v. *Dreyfus*, *supra*. Her business was dealing in rubber and rice but occasionally she obliged friends and neighbours with loans.

No experienced judge with knowledge of social and economic conditions in this country would accept such a story without the most careful scrutiny. He would, in the first instance at any rate, view it with very grave suspicion for it might well provide a cloak for the very type of business which the Moneylenders Ordinance is presumably intended to discourage. Here, however, Hepworth J. examined the evidence with great care and in the event, having observed the plaintiff under lengthy cross-examination, he accepted her story as true. For myself I can see no grounds on which this court would be justified in interfering with that conclusion and I would accordingly dismiss the appeal with costs.

There is, however, one point that calls for consideration. As has been pointed out the plaintiff sued the defendant not only personally but as administrator of the estate of his deceased father. In the course of the trial, not a word was said regarding any claim against the estate nor is it possible to find anything anywhere in the case that could possibly justify such a claim. In the circumstances I think this is one of the exceptional cases where this court should of its own motion exercise its power under section 38(4) of the Courts Ordinance and should vary the judgment of the court below so as to make it a judgment only against the defendant personally. If the defendant is the only beneficiary of the estate this will not benefit him or prejudice the plaintiff in any way. If there are other beneficiaries they have been neither represented nor heard and their interests must be safeguarded.

Barakbah and **Azmi JJ.** concurred.

Appeal dismissed.